Nos. 27 and 28

In the Supreme Court of the United States

OCTOBER TERM, 1962

BURLINGTON TRUCK LINES, INC., ET AL., APPELLANTS

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION

GENERAL DRIVERS AND HELPERS, LOCAL 554, AFFILIATED WITH THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, APPELLANT

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ILLINOIS

BRIEF FOR THE UNITED STATES AND INTERSTATE COMMERCE COMMISSION

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OPINIONS BELOW

The opinion of the district court (R. 209–255) is reported at 194 F. Supp. 31. The report of the Interstate Commerce Commission (R. 99–120) is reported at 79 M.C.C. 599.

JURISDICTION

The judgment of the district court dismissing the complaint was entered on April 27, 1961 (R. 209), and the notices of appeal in Nos. 27 and 28 were filed on June 23, 1961 (R. 274–277) and June 22, 1961 (R. 270–273), respectively. Probable jurisdiction was noted on January 8, 1962 (R. 281; 368 U.S. 951). The jurisdiction of this Court rests on 28 U.S.C. 1253 and 2101(b).

STATUTES INVOLVED

The National Transportation Policy, 54 Stat. 899, 49 U.S.C., preceding § 1, and Sections 204(c), 207(a) and 212(a) of the Interstate Commerce Act, 49 Stat. 546, 551, 555, as amended, 49 U.S.C. 304(a), 307(a) and 312(a), are reproduced in the Appendix, pp. 37–39, *infra*.

QUESTIONS PRESENTED

1. Whether the Commission's grant of a certificate was warranted by the standards of public convenience and necessity in Section 207(a) of the Interstate Commerce Act.

2. Whether the authorization of additional motor carrier service to replace inadequate interchange service, rather than an order requiring the existing carriers to resume interchanging, was an appropriate exercise of the Commission's power to make a choice of remedies under the Interstate Commerce Act.

3. Whether the fact that the inadequacy of service stemmed from labor difficulties deprived the Interstate Commerce Commission of authority to meet the transportation needs thereby generated.

STATEMENT

These cases are here on direct appeal from the final judgment of a three-judge district court, sustaining a report and order of the Interstate Commerce Commission. The Commission's order (R. 120) granted a certificate of public convenience and necessity to Nebraska Short Line Carriers, Inc. ("Short Line"), authorizing it to perform interstate motor carrier operations as a common carrier of general commodities between Omaha and Chicago (serving no intermediate points) and between Omaha and St. Louis (serving the intermediate point of Kansas City, Missouri), but restricted to traffic originating at or destined to points in Nebraska (R. 118–119).

Short Line is a Nebraska corporation owned by twelve relatively small motor carriers (hereinafter, the "stockholder-carriers") operating in interstate commerce primarily within the State of Nebraska (R. 84). All of these stockholder-carriers transport general freight over regular routes from eastern and central Nebraska to Omaha and other gateway points at which, prior to the breakdown in services which occasioned these proceedings, they interchanged traffic with as many as 22 larger motor carriers for movement to and from points beyond Nebraska (R. 22). The various tariffs filed by the stockholder-carriers and the larger interstate carriers established through interline rates and provided for interchanging traffic at the gateways. The stockholder-carriers serve, in addition to other points, a number of small Nebraska towns and villages which have no regular motor carrier service except that of one of the stockholder-

carriers and no daily rail service, so that they are dependent upon the stockholder-carriers for any regularly scheduled common-carrier service as well as for pick-up and delivery and other services.[1]

For several years, the stockholder-carriers had resisted attempts on the part of the Teamsters Union[2] to organize their employees. Despite the general disinterest of the employees in seeking union membership, the union determined that organizational efforts should be concentrated upon the management of the stockholder-carriers in order to attempt to get their employees into the union by agreement. Failing in the attempt, the union thereupon decided to enforce its demands by bringing economic pressure to bear on the stockholder-carriers, declaring certain of the stockholder-carriers "unfair" and instituting a secondary boycott against their traffic through the larger unionized carriers on which the stockholder-carriers were dependent for the handling of interline traffic moving to and from points beyond Nebraska. The boycott was imposed pursuant to so-called "protection of rights" or "hot cargo" clauses contained in the labor contracts between the larger carriers and affiliates of the Teamsters Union (R. 102–103).[3]

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[1] See pp. 11–12, *infra*.

[2] International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, an affiliate of which is the appellant in No. 28.

[3] These clauses in relevant part provide that it shall not be a cause for discharge if an employee of the connecting carrier refuses to handle "unfair" goods, and that the Union and its members reserve the right to refuse to handle goods from or to any firm or truck which is involved in any controversy with the Union (R. 103). Cf. *Local 1976, Carpenters' Union* v. *National Labor Relations Board*, 357 U.S. 93, 95, 97.

In early May of 1956, certain of the stockholder-carriers began to experience widespread difficulty in effecting normal interchange with the larger carriers (R. 103).[4] These difficulties, encountered at Omaha and at other interchange points, consisted of the refusal of many of the larger carriers (1) promptly to accept shipments tendered to them by the stockholder-carriers for points outside Nebraska, (2) to deliver to the stockholder-carriers inbound traffic which had been directed by shippers to be routed over the lines of a stockholder-carrier, and (3) to deliver inbound traffic which normally would have been handled by the stockholder-carriers at Omaha and other connecting points for delivery to interior points in Nebraska (R. 104). This caused shippers and consignees to experience substantial delays, inconvenience and unforeseen expense in the movement of freight to and from interior Nebraska points (R. 105).[5] A few of the interlining carriers (notably appellants Burlington Truck Lines, Inc., and Sante Fe Trail Transportation Company) continued to accept interline traffic from the stockholder-carriers "more or less regularly" and "generally" maintained normal interline relationships with them (R. 104); however, interchange practices with even these carriers were less satisfactory than they had been prior to May 1956 (R. 82, 83).

[4] Deliveries of interchange traffic ceased generally to one of the stockholder-carriers on or about September 17, 1955, when a picket line was placed at its Omaha terminal by the Teamsters Union (R. 26–27, 104). None of the other stockholder-carriers has had any dispute with its employees, and no picket lines were established against them (R. 29, 104).

[5] The facts relating to the actual breakdown of service are set forth in greater detail at pp. 12–15, 17–19, *infra*.

The stockholder-carriers organized Short Line on June 14, 1956. By application filed on June 22, 1956, Docket No. MC–116067, Short Line sought authority to transport general commodities in interstate commerce on a regularly scheduled basis from several major Nebraska and Iowa points, including Des Moines, Omaha, Lincoln, and Council Bluffs, to Minneapolis, Minnesota, and St. Joseph and St. Louis, Missouri, as well as to Chicago and Denver, serving all intermediate points (R. 119–120). In a separate application filed January 10, 1957, Docket No. MC–116067 (Sub-No. 2), Short Line sought authority to transport general commodities between Omaha and points in 32 different states on an irregular basis (R. 101). The two applications were heard by different hearing examiners. Each conducted an extensive hearing at which a number of shippers offered testimony in favor of the application at issue, and a number of motor carriers (including appellant carriers) and railroads offered testimony in opposition. Although each examiner recognized that the boycott had caused marked service inadequacies, they both (in separate reports, R. 17–76, R. 77–98) recommended against the grant of a certificate to Short Line.

The two proceedings were consolidated for decision by the Commission, which adopted the factual findings in the two examiners' reports (R. 107). On the basis of those facts the Commission found that the union-induced boycott of the stockholder-carriers by the large interstate carriers had resulted in "a substantial disruption in motor service to a large portion of the Nebraska shipping public" and "serious inadequacies

in the service available to a large section of the public" (R. 116, 117). The Commission concluded that, while Short Line had not established a need for the service proposed in its application for irregular authority (Docket No. MC–116067 (Sub-No. 2)) (R. 115), the grant of a limited portion of its application for regular authority was required by "the present and future public convenience and necessity" (R. 118). Accordingly, the Commission awarded Short Line authority to operate motor service between Omaha, on the one hand, and Chicago, St. Louis and Kansas City, on the other, restricted to traffic originating at or destined to points in Nebraska (R. 118–119).[6]

Appellant Burlington Truck filed a complaint in a United States district court seeking to have the Commission's order enjoined and set aside; the other appellants intervened in that proceeding. The three-judge district court, with one judge dissenting (R. 255), sustained the Commission's order (R. 209). It held that the order was "supported by substantial evidence that the service of existing carriers, under the circumstances here involved, was inadequate" and found the evidence to establish "that the competitive service as here granted is in the public interest" (R. 242).

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[6] Service had been inaugurated under temporary authority granted by the Commission by order of December 4, 1956 (R. 21). As of the date of the decision, the carrier had inaugurated one round-trip schedule daily between Omaha and Chicago and one between Omaha and Kansas City. Service was also being offered at the time of the decision between Omaha and St. Louis on a call and demand basis. All vehicles and terminal facilities were leased (R. 102).

SUMMARY OF ARGUMENT

I

The record in this case contains extensive testimony by users of motor carrier service in small Nebraska towns which are largely, if not wholly, dependent upon the stockholder-carriers for regular common-carrier transportation service. They testified that the disruption of service occasioned by the interchanging carriers' boycott of the stockholder-carriers had caused them substantial additional expense, delays and inconvenience. On the basis of this evidence the Commission found that there were serious inadequacies in the service available to a large segment of the Nebraska shipping public, and that the present and future public convenience and necessity required the authorization of a limited new service to correct these inadequacies. In view of the wide scope of the Commission's discretion in determining the public convenience and necessity, and of the Commission's past practice of granting new certificate authority in analogous situations, this conclusion was reasonable and sound.

There was an adequate basis in the record for the Commission to reject appellants' contention that the disruption of service was not sufficiently "complete" because some of the interstate carriers continued to do some interchanging with the stockholder-carriers. The evidence showed, and the Commission found, that such interchanging as these carriers were providing was insufficient to restore adequate interline service.

The Commission acted reasonably in declining to accept the contention that, because the labor problem giving rise to the service disruption was "temporary,"

there was no basis for a grant of permanent certificate authority to correct it. The primary basis for this contention was a "new policy," adopted by several of the interstate carriers, that they would attempt to achieve normal interchanging. That this policy was highly qualified and was adopted on the eve of the hearings herein were alone sufficient to warrant the Commission's refusal to give it decisive weight. Moreover, the labor difficulties here were of long standing, and there was no reliable basis for concluding that they would soon be settled. Accordingly, the Commission was justified in granting a permanent certificate to correct the resulting inadequacies of service.

II

The Commission properly exercised its discretion in meeting the transportation problem involved by authorizing additional motor carrier service rather than by issuing a cease and desist order requiring the existing carriers to interchange with the stockholder-carriers in accordance with their tariffs. The Commission had ample grounds for refusing to assume that such an order would eliminate the service inadequacy, in view of the long-standing and continuing character of the labor difficulties from which it arose. Moreover, the Commission's inability to compel the carriers to enter into and maintain tariff agreements for interchanging would sharply limit the efficacy of such an order. The Commission has a wide discretion in determining which of the remedies available to it will best satisfy the transporta-

tion needs at issue. It exercised that discretion carefully and reasonably in this case.

III

The Commission's decision does not impinge upon the jurisdiction of the National Labor Relations Board, as appellant union contends. This Court held in *Local 1976, Carpenters' Union* v. *National Labor Relations Board*, 357 U.S. 93, that the Board has no concern with common carriers' performance of their service obligations, just as the Commission has no concern with their labor agreements. Here the Commission carefully avoided adjudicating the legality or enforceability of the "hot cargo" clauses that gave rise to the service inadequacies involved in this case. It simply dealt with the transportation problem at issue in a manner consistent with its responsibilities under the Interstate Commerce Act and the National Transportation Policy.

ARGUMENT

I

THE COMMISSION'S GRANT OF A CERTIFICATE WAS WARRANTED BY THE STANDARDS OF PUBLIC CONVENIENCE AND NECESSITY IN SECTION 207(a) OF THE INTERSTATE COMMERCE ACT

Under Section 207(a) of the Interstate Commerce Act, 49 Stat. 551, 49 U.S.C. 307(a), the Commission is authorized and required to issue a certificate for motor common carrier operation when the service proposed "is or will be required by the present or future public convenience and necessity"; and under the National Transportation Policy (49 U.S.C. pre-

ceding § 1) this authority is to be exercised to promote "adequate, economical, and efficient service." In the following pages, we show that the record contains substantial evidence from which the Commission could conclude that adequate, economical and efficient motor carrier service was not available to a substantial group of shippers and consignees (see pp. 11–16, *infra*), and that this inadequacy of service was not of such a minor or temporary character as to warrant ignoring it (see pp. 16–24, *infra*). On such a record, we submit, it was plainly within the Commission's wide discretion in determining the public convenience and necessity to grant Short Line, the applicant herein, the limited certificate at issue.

It should be observed at the outset that the Commission attacked the transportation problem involved here with a due regard for the limitations on its own jurisdiction and expertise. Although the service inadequacy at issue stemmed ultimately from labor difficulties, the Commission consciously refrained from passing on the merits of those difficulties, restricting its consideration to the task of restoring adequate transportation service. So restricted, its task was not substantially different from what it would have been had the service inadequacy stemmed from carrier inefficiency or financial condition. The simple fact was that a gap in service existed, and it was the Commission's duty to fill it.

1. At the two hearings on Short Line's applications, extensive testimony was presented from many persons operating businesses in fourteen cities and towns in

eastern Nebraska served by the stockholder-carriers (R. 29, 89–94). In a number of these communities, the stockholder-carrier provided the only regularly scheduled motor carrier service (R. 25, 26, 30, 34, 36, 37), and many of them did not receive daily rail service (R. 30, 32, 33, 36, 38).[7] These users required fast, frequent, dependable transportation service for a variety of reasons; some of them, for example, were dealers in perishable commodities (R. 30, 32, 36, 42), some were automotive or farm implement dealers requiring emergency parts shipments (R. 31, 35, 38, 39), some were retailers who maintain low inventories (R. 32, 33, 38, 40, 41, 45) (see also R. 35, 46).

Prior to the spring of 1956, these merchants employed the services of stockholder-carriers, usually on an interchange basis with one of the larger interstate carriers, and found this service satisfactory. When the boycott against the stockholder-carriers began to develop, shipments began arriving by other means, often in violation of these merchants' shipping instructions (R. 30, 31, 33, 36, 40, 43, 44). Frequently these shipments, although dispatched by motor carrier, would arrive by rail, which the merchants found unsatisfactory because of added expense (R. 30, 31, 32, 37, 92–93), delays (R. 30, 31, 32, 34, 37, 42, 45, 92, 93), and inconvenience (R. 30, 31, 32). In other instances shipments would arrive by motor carriers (other than stockholder-carriers) whose service was unsatisfactory because it was irregular or infrequent

[7] Although some of the larger carriers were authorized to serve some of these points, they did not have sufficient freight to justify regular operations and, under normal conditions, interchanged with connecting lines (R. 53, 57).

(R. 34, 36, 44), was inconveniently timed (R. 34, 39), involved delays (R. 35, 36, 39, 43, 45) or added expense (R. 36), or failed to provide needed special service (R. 42, 46). In some cases, the merchants were forced to go to other towns to pick up shipments (R. 35, 38). In others, they had to switch to all-rail shipment, which they found too slow (R. 32, 37, 38, 45).[8]

Accurately summarizing this record evidence, the Commission found (R. 107):

> As a result of the breakdown of interchange arrangements at Omaha, shippers at interior Nebraska points have experienced delays in the movement of their outbound shipments to destination, and consignees at such points have experienced delays, inconveniences and unforeseen expense in connection with their inbound shipments attributable to the failure of the originating carriers serving Omaha to honor their routing instructions or to route their unrouted shipments in the most logical manner, namely, over the lines of the stockholder-carriers providing daily scheduled service to their communities. When motor shipments are diverted to rail, the consignees suffer not only delays in delivery but also the additional expense of having to pay a

[8] Testimony was also received from four firms that had themselves experienced labor difficulties involving picket lines (R. 47–50, 89–92). The employees of unionized motor carriers had refused to cross the picket lines, thus denying them pick-up and delivery service (R. 47, 48, 49, 90, 91, 92), and forcing them to pick up their own deliveries (R. 47), hire a local cartage firm at added expense (R. 48), employ rail service (R. 91), or experience substantial losses of business (R. 49–50, 91).

> combination of rail and motor local rates since there are no joint motor-rail rates published on such traffic through Omaha.

Appellants do not appear to question these findings, based as they are on undisputed evidence.

We submit that this undisputed record of service inadequacy was clearly sufficient to warrant the Commission's conclusion that authorization of a new service was warranted. It is settled by many decisions of this Court that the Commission possesses a broad discretion to determine the public convenience and necessity.[9] In *Interstate Commerce Commission* v. *Parker Motor Freight,* 326 U.S. 60, 65, this Court succinctly described the scope of the Commission's authority:

> The purpose of Congress was to leave to the Commission authoritatively to decide whether additional motor service would serve public convenience and necessity. * * * This, of course, gives administrative discretion to the Commission, * * * to draw its conclusion from the infinite variety of circumstances which may occur in specific instances.

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[9] The corollary to this doctrine is the well recognized limitation upon the scope of judicial review of administrative action. "The judicial function is exhausted when there is found to be a rational basis for the conclusions approved by the administrative body." *Mississippi Valley Barge Line Co.* v. *United States*, 292 U.S. 282, 286–287. A judicial tribunal "cannot substitute its own view concerning what should be done, whether with reference to competitive considerations or others, for the Commission's judgment upon matters committed to its determination, if that has support in the record and the applicable law." *United States* v. *Pierce Auto Freight Lines, Inc.*, 327 U.S. 515, 536.

More recently, the Court observed in *Schaffer Transportation Co.* v. *United States*, 355 U.S. 83, 88, that "the Commission possesses a 'wide range of discretionary authority' in determining whether the public interest warrants certification of any particular proposed service."

The Commission has often granted new certificate authority in analogous instances of service inadequacy. Particularly relevant here is the fact that the Commission has consistently certificated new through services where a clear showing was made of inadequacy in existing joint-line service. See, *e.g.*, *Penn Ohio New York Exp. Corp. Extension-New York*, 27 M.C.C. 269, 273 (1940); *Malone Freight Lines, Inc., Extension-Textiles*, 61 M.C.C. 501 (1953); *Dallas & Mavis Forwarding Co., Extension-Montana*, 64 M.C.C. 511, 514 (1955); *Braswell Extension-California*, 68 M.C.C. 664, 665–666 (1956); *Kenosha Auto Transport Corp. Extension-Kenosha, Wis.*, 72 M.C.C. 289, 291 (1957).

Moreover, there is a clear warrant in the decisions of this Court for the conclusion that something less than a total absence of service will justify the authorization of a new service; thus, in the *Schaffer Transportation* case, *supra*, shippers' testimony as to the inadequacies of existing common carrier service in relation to their shipping needs was held decisive in the absence of a "finding that the authorization of the proposed service would impair the sound operation of the carriers already certificated" (355 U.S.

at 86, 92).[10] Cf. *Interstate Commerce Commission* v. *J–T Transport Co.*, 368 U.S. 81. In *American Trucking Ass'ns, Inc.* v. *United States*, 355 U.S. 141, the Court, in sustaining the Commission's grant of a motor carrier certificate, relied upon "evidence of a serious need for less-than-truckload peddle service" at small towns in Iowa and the fact that "other carriers frequently failed to handle such traffic, and gave service inferior to that of [applicant] when they did operate" (355 U.S. at 153); the Court also sustained the authorization of a new truckload operation between major points to ensure an economically feasible peddle operation (355 U.S. at 153–54). The Commission's efforts there to maintain adequate service at small Iowa towns is in many respects similar to its efforts in this case to ensure adequate service to and from the small Nebraska communities involved here.

2. Appellants contend, however, not only that the disruption of through service on which this certification was based was not so "complete" as to warrant the award of new authority, but also that the labor difficulties which gave rise to it were essentially of a temporary character. There is, we submit, a wholly adequate basis in the record for the Commission to have concluded, first, that the disruption was sufficiently widespread and injurious to justify the au-

[10] It is noteworthy that, in the instant case, neither the examiners nor the Commission was able to find that any of the protesting carriers would suffer substantial adverse effects from the grant of a limited certificate to Short Line. Both examiners did make findings (adopted by the Commission, R. 167) that the small stockholder-carriers suffered substantial losses of business as a result of the service disruption (R. 22–26, 83).

thorization of new and additional service and, second, that the prospects for a complete and permanent solution to the labor difficulties out of which it arose were too speculative to allow the Commission to take them for granted.

(a) The basis for appellants' argument that the disruption of service was not "complete" is that (as the Commission found) a few of the larger carriers (notably appellants Burlington Truck Lines, Inc., and Santa Fe Trail Transportation Company, which are rail subsidiaries) "appear to have accepted interline traffic from the stockholder-carriers more or less regularly when offered and to have generally maintained normal interline relationships with them" (R. 104). However, that finding must be read in the light of a more specific finding adopted by the Commission (R. 82; R. 107) that

> even those carriers [*i.e.*, Burlington Truck and Santa Fe Trail] did not maintain the same free and open interchange practices in effect before May 1956. In many or most instances, the interchanged traffic had to be handled at the terminal by officials or supervisory personnel, because the employees normally handling such traffic would not touch it.

Moreover, specific instances of rejection of shipments by both Burlington Truck and Santa Fe Trail appear in the record (R. 179, 182–183, 185, 191–193; R. 179, 181, 184–185, 186, 198–199), as well as many instances of Burlington Truck's ignoring routing instructions (R. 195, 197, 202–203, 204–205, 206). Significantly, neither the examiners nor the Commission found that

Burlington Truck and Santa Fe Trail provided an adequate substitute service.

The Commission was, we submit, entitled to conclude that reliance on a handful of interlining carriers with necessarily limited authority and capabilities, in place of the numerous carriers that had interchanged with the stockholder-carriers prior to the service disruption, would not be "adequate" service to shippers and consignees.[11] It also had good reason to consider that the necessity for these few carriers to rely on their supervisory personnel in order to provide the interchange service raised serious questions as to whether that service was "economical" or "efficient." It was justified in finding, as it did (R. 104–105) that, despite such service as Burlington Truck and Santa Fe Trail continued to render, (1) as to outbound freight, "the uncertainty of the situation has resulted in considerable harassment to the [stockholder-]carriers and substantial delays in the movement of freight," and (2) as to inbound freight, "shipper routing instructions have been generally ignored" and traffic "normally turned over to the stockholder-carriers for ultimate delivery to points on their lines" has been routed otherwise, "with resultant delays in delivery, inconvenience, and added expense to shippers."[12] In short, as the Commission

[11] For example, Burlington Truck was the only one of the nine protestant carriers operating between Omaha and Chicago that maintained continued interchange service (R. 109). And Santa Fe Trail serves only one of the three non-Nebraska points (Kansas City, *ibid.*) to and from which the Commission found that Omaha and interior Nebraska points were not being adequately served.

found, whatever interchanging these carriers were providing had proved insufficient to eliminate "serious inadequacies in the service available to a large section of the public" (R. 117).

(b) The apparent basis for appellants' contention that the service disruption was transitory, because the labor problems from which it stemmed were temporary, is the fact that on April 3, the eve of the evidentiary hearing on Short Line's second application that began on April 4, some of the large interlining carriers announced the adoption of a "new policy * * * to the effect that serious and persistent attempts will be made to interchange freely and normally with all eastern Nebraska carriers" (R. 94). We believe that, for a number of reasons, it was within the Commission's sound discretion to conclude that the likelihood of a permanent resolution of the labor problems causing the service disruption was sufficiently questionable that the authorization of a reliable new service was required by the present and future public convenience and necessity.

First, the policy (as reflected in the undisputed findings of the second examiner) was highly qualified. Apparently it was adopted by only a limited number of the numerous carriers that had interlined with the eastern Nebraska carriers prior to the disruption of service. (R. 94–95). It was phrased only in terms of "attempts" to achieve free and normal interchanging (R. 94), providing no assurance that success was to be anticipated. Indeed, these carriers admitted that, to the extent that any further labor problems involved picket lines (and, as we have noted, some

of the situations that gave rise to the disruption of service did involve picket lines, see notes 4, 8, pp. 5, 13, *supra*), "there might still be difficulties in interchanging traffic in the usual and normal methods of interchanging" (R. 94–95). In sum, the "policy" as stated scarcely offered a very substantial basis for optimism that the persistent difficulties which had caused the service disruption would be eliminated.

Second, the Commission was not required to rely upon a "new policy" adopted the day before the commencement of hearings at which the impact of the large carriers' previous policy upon service to the public was to be considered. As the court below observed, "the Commission is not required to give decisive weight to such a belated zeal to serve the public" (R. 246). See also *Southern Pacific Terminal Co.* v. *Interstate Commerce Commission*, 219 U.S. 498; *Corn Products Refining Co.* v. *Federal Trade Commission*, 144 F. 2d 211, 220 (C.A. 7), affirmed, 324 U.S. 726.

Most important in this connection is the factual context in which the Commission had to consider the matter. The widespread service deficiencies giving rise to a public need for new service had persisted for eleven months (from May of 1956) as of the opening of the second hearing in April 1957. The labor problem from which these service deficiencies stemmed had been long-continuing, and there was no evidence before the Commission that it had been solved or that there was any reasonable prospect of its early resolution (other than an announced "new policy" of several carriers to "attempt" to circumvent it). If the

Commission had been confronted, for example, with a situation in which a carrier that had failed to perform its service obligations for a year because of insufficient equipment represented to the Commission that it would "attempt" to obtain the equipment soon, there would be no question of the Commission's authority—if not its duty—to grant authority to another carrier to fill the gap in service. So here, the Commission, having allowed fully adequate time for the labor problem to be resolved and knowing that there still was no substantial promise of a prompt and lasting solution, was entirely justified in filling the service gap that had been created.

That the Commission takes a consistent and rational approach to this problem is evident from a number of its past decisions in which it has declined to allow genuinely temporary labor difficulties that had been definitely resolved to be the basis for authorizing additional service. Thus, in *Galveston Truck Line Corp. Extension—Oklahoma,* 79 M.C.C. 619, 620-622 (1959), the interruption in interchange service had lasted but two months, and service had been resumed six months before Galveston filed its application. In *Jack Hudson, Inc., Contract Carrier Application,* 54 M.C.C. 681 (1952), the application was urged upon the ground that the protesting motor carrier had suspended operations temporarily because of labor difficulties two years prior to the hearing; the Commission denied the application, stating that "the mere possibility of a future interruption in public transportation as a result of labor difficulties" would not be a valid reason for granting it (54 M.C.C. at 684). Similarly, in *Mason*

& Dixon Tank Lines, Inc., Extension—Chemicals, 83 M.C.C. 159 (1960), the Atomic Energy Commission, as a shipper, desired additional service to insure against any interruption in service due to labor difficulties; however, the AEC had not experienced any interruption in service, and the Commission denied the application, citing the *Jack Hudson* case, *supra*.

Here, in contrast, the Commission observed that the eleven-month-old labor difficulties out of which the disruption in service had arisen "were of more recent origin and were continuing to be experienced up to and including the time of the hearing" (R. 118). This finding was based on undisputed evidence, and it amply supported the Commission's conclusion that it should take steps to deal with the pronounced service inadequacies which prevailed, rather than indulge in the dubious speculation that letting "nature take its course" would lead to a restoration of adequate service.

Appellant carriers also suggest that the Commission should have recognized that, as a result of this Court's decision in *Local 1976, Carpenters' Union* v. *National Labor Relations Board*, 357 U.S. 93, "the resistance of the carriers [to the invocation of "hot cargo" clauses] would increase rather than diminish and that the interchange difficulties themselves in all likelihood would be completely overcome" (Br. in No. 27, p. 25; see also *id.* at pp. 15–16). However, not only would such a conclusion involve a considerable degree of speculation but, by calling for a judgment upon the impact of an important labor law decision on the labor practices of the carriers, it would have injected the Commission into the delicate area of la-

bor relations that it so persistently sought to avoid (see R. 115–116). The wisdom of the Commission's restraint in this regard has been dramatically demonstrated with respect to this very point that the appellant carriers raise: while they seem to contend that the *Carpenters' Union* case, together with the 1959 amendments to Section 8 of the National Labor Relations Act,[12] spell the end of "hot cargo" clauses, the appellant *union* disagrees; it argues that under the *Carpenters' Union* case and the 1959 amendment "a protection of rights clause (hot cargo) would not necessarily violate" the Labor Act (Br. in No. 28, p. 11; see also *id.* at pp. 11–12). The Commission does not doubt its lack of competence to resolve that controversy.

There was, we submit, a substantial basis in the record as a whole for the Commission's conclusions, not only that there had been "substantial disruption in motor service to a large portion of the Nebraska shipping public" and "serious inadequacies in the service available to a large section of the public" (R. 116, 117), but that such limited interline service as was available did not correct these inadequacies (R. 104–105) and that there was no dependable prospect of a permanent solution to the labor problem that had given rise to them (R. 118). These conclusions in turn adequately support the Commission's ultimate finding that the "present and future public convenience and necessity" required the award of limited new

[12] 49 Stat. 452, as amended by 73 Stat. 543, 29 U.S.C. Supp. III 158(e).

authority to Short Line (*ibid.*). Accordingly, the court below properly held (R. 242)

> that the order of the Commission is supported by substantial evidence that the service of existing carriers, under the circumstances here involved, was inadequate, and that the proof in the record shows that the competitive service as here granted is in the public interest.

II

IT WAS AN APPROPRIATE EXERCISE OF THE COMMISSION'S CHOICE OF REMEDIES TO AUTHORIZE ADDITIONAL SERVICE RATHER THAN TO ORDER THE APPELLANT CARRIERS TO RESUME INTERCHANGE

The appellant carriers contend that the Commission's award of a certificate to Short Line "was also arbitrary and contrary to the standards of the statute because it disregarded other more appropriate remedies provided by the Interstate Commerce Act itself, particularly Section 204(c)" (Br. in No. 27, pp. 21–27). Apparently they do not contend that the Commission may not ever cope with service deficiencies by authorizing additional service; such a contention would fly in the face of the many Commission decisions authorizing additional service upon a showing of inadequacy in the existing interchange service, although existing carriers had ample authority to provide the needed service (see p. 15, *supra*). Rather they contend that in this case the Commission did not make a "rational choice" of remedies (*id.*, at p. 22). Here, too, the justification of the Commission's action is found in the circumstances.

Section 204(c) of the Interstate Commerce Act, 49 Stat. 546, 49 U.S.C. 304(c), authorizes the Commission, after notice and hearing, to issue an order to compel a motor carrier to comply with any provision of the Act or with any requirement established pursuant to the Act.[13] Without doubt, the Commission could have instituted an appropriate proceeding with a view to issuing an order under Section 204(c) directing the appellant carriers to cease and desist from the interruption of interchange with the stockholder-carriers pursuant to their filed tariffs. Indeed, it issued such an order in *Galveston Truck Line Corp.* v. *Ada Motor Lines, Inc.*, 73 M.C.C. 617 (1957).[14]

However, it was reasonable for the Commission to conclude that such an order would be less effective in this case than in the *Galveston* case. As we have noted (see p. 21 and n. 14, *supra*), the labor difficulties giving rise to the disruption of service in that case had ceased to exist; the Commission could expect

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[13] Appellant union suggests Section 212 of the Act, 49 Stat. 555, as amended, 49 U.S.C. 312, as an alternative remedy (Br. in No. 28, pp. 18–19). That section provides that the Commission may suspend, change or revoke a carrier's certificate "for willful failure to comply with" its certificate obligations or Commission orders. While this section might properly be invoked to enforce a Section 204(c) order, it seems questionable whether, in the absence of such an order, the requisite element of wilfulness was present. In any event, we submit that the same considerations that justified the Commission's preference for employing Section 207 rather than Section 204(c) (see pp. 25–28, *infra*) apply with equal force to Section 212.

[14] That case involved the same labor controversy as that involved in the *Galveston Extension* case, cited at p. 21, *supra*, and in the Commission's decision at R. 118.

that they would not stand in the way of a resumption or maintenance of service. Here, the labor difficulties "were continuing to be experienced up to and including the time of the hearing" (R. 118). The Commission was entitled to consider the possibility, for example, that, if it ordered the existing interstate carriers to interchange, attempted compliance might so aggravate their labor difficulties as to cause a complete cessation of operations (see Jurisdictional Statement in No. 27 (then No. 336, Oct. Term 1961), p. 10). Moreover, the Commission had before it the fact that an injunction obtained by the National Labor Relations Board against the Teamsters on behalf of one of the stockholder-carriers had been unavailing to restore adequate interchange service (R. 27–28); even after it had been issued, "traffic was accepted in some instances and refused at other times," resulting in delays in which it sometimes took the stockholder-carrier "at least two days to dispose of shipments" (R. 28). The Commission was not required to assume that a cease and desist order issued by it would be substantially more effective than the court's injunction in remedying the service inadequacies within a reasonable time. It was entitled to follow the course best calculated to bring about a restoration of adequate service: the certification of a new carrier to provide that service.

Furthermore, the efficacy of a Section 204(c) order is severely limited by the fact that under Section 216(c) of the Act, 49 Stat. 558, 49 U.S.C. 316(c) (unlike the provisions of Section 216(a) applicable to transportation of passengers), the Commission is with-

out power to compel motor carriers of freight to enter into or maintain through route arrangements, which normally depend upon the tariffs voluntarily filed by the carriers, to provide such joint service. See *Kansas City S. Transport Co., Common Carrier Application,* 10 M.C.C. 221, 235–236 (1938); *Restrictions, Riss & Co., and Eliminations; Hi-Way Motor,* 46 M.C.C. 290, 292 (1946); *Union Pacific Motor Freight Co.-Key Point Restrictions,* 74 M.C.C. 279, 283 (1958). Thus, in *Planters Nut & Chocolate Co. v. American Transfer Co.,* 31 M.C.C. 719 (1942), the Commission issued a cease and desist order against certain carriers adhering to "hot cargo" clauses, but noted that one such carrier had provided in its tariff that it would not interchange traffic; the Commission stated that this provision relieved the carrier from "its preexisting obligation to accept shipments on through bills of lading," and that it need only accept goods on its own bills at the local rate to destination (31 M.C.C. at 721–722).[15] In the present case, one of the connecting carriers (Riss) had already cancelled its through service arrangement with one of the stockholder-carriers (R. 29); there is nothing the Commission could do to prevent other carriers from following suit.

There were, in short, sound reasons for the Commission to prefer the certification process to the compliance process in meeting the transportation problem presented by this case. Appellants urge, however, that the "temporary" character of the labor conditions giving rise to this transportation problem mili-

[15] The combination of local rates is generally higher than a through joint rate.

tated against a grant of permanent certificate authority (Br. in No. 27, p. 21; Br. in No. 28, pp. 17–18). We have already noted that the record amply sustains the Commission's refusal to assume that these labor conditions were transitory or that they would soon be alleviated (see pp. 19–21, *supra*). We note, too, the relevant fact that, notwithstanding the breadth of Short Line's two applications, the Commission's grant of authority was quite limited in scope (see pp. 6, 7, *supra*). Appellant carriers also contend that to certificate a new carrier punishes all of the existing interstate carriers, the "innocent and guilty alike" (*i.e.*, those who had continued to interchange and those who had refused) (Br. in No. 27, p. 23). In truth, of course, the certification process is not a "punishing" process (see R. 244); its purpose is to adjudicate neither "guilt or innocence" nor even (by contrast to the compliance process) faithfulness, *vel non*, to service obligations. Its sole purpose, and the sole end to which the Commission employed it here, is to determine transportation needs and to assure their satisfaction.

The Commission's discretion in choosing the remedies by which it will cope with such service inadequacies as those it confronted in this case was succinctly stated by the three-judge court in *Davidson Transfer & Storage Co.* v. *United States*, 42 F. Supp. 215, 219–220 (E.D. Pa.), affirmed, 317 U.S. 587:

> * * * In the case at bar the Commission has found that the services of an additional carrier are required over the routes designated in order that the public may have adequate service. It

> made no finding that any of the protestant carriers were derelict in their duties, but even if the Commission had made such a finding, we would not conclude that the Commission was thereby prohibited from authorizing an additional, and, if need be, a competing carrier to operate in the field. We think that one of the weapons in the Commission's arsenal is the right to authorize competition where it is necessary in order to compel adequate service and there is nothing in any of the sections cited or in their legislative history that would require a contrary conclusion. The conception that the public must wait while the Commission exercises its statutory powers fortified by orders of court, to compel existing carriers to do what they should do, is one which does not commend itself to common sense and the public interest.

That statement was consistent with frequent pronouncements by this Court of the breadth of the Commission's authority to choose which of several remedies will best satisfy the transportation needs at issue. Thus, in *United States* v. *Detroit Navigation Co.*, 326 U.S. 236, 241, the Court held that "[the Commission's] doubt that the public interest will be adequately served if resumption of service is left to existing carriers is entitled to the same respect as its expert judgment on other complicated transportation problems. * * * It may be that the public interest requires that future shipping needs be assured rather than left uncertain. The Commission has the discretion so to decide." See also *Interstate Commerce Commission* v. *Parker Motor Freight*, 326 U.S. 60, 70 ("the Commission may authorize the certificate even though the existing

carriers might arrange to furnish successfully the projected service").

Here the Commission, fully recognizing that it had a choice of remedies, carefully articulated its reasons for choosing to proceed by way of a grant of new certificate authority (R. 117–118). This judgment was, we submit, a reasonable one, well within the wide discretion the Commission possesses for developing the appropriate solution to difficult and complicated transportation problems. The court below agreed (R. 246–247), and its decision should be affirmed.

III

THE COMMISSION'S DECISION INVOLVES NO CONFLICT WITH THE JURISDICTION OF THE NATIONAL LABOR RELATIONS BOARD

The decision of the Commission now before the Court does not in any way impinge upon appellants' labor agreements or the collective bargaining process. The present decision is limited to a determination that the present and future public convenience and necessity warrant a new service between Omaha and three other points; it does not deal in any way with the merits of any labor controversy or the validity or enforceability of the provisions of any collective bargaining agreement. The Commission expressly refused to construe appellants' labor agreements (R. 115), and the court below agreed that the Commission is not concerned with the contents of labor contracts (R. 254).

The appellant union (but not the appellant carriers) argues that the National Labor Relations Board

possesses "exclusive" jurisdiction of the "facts and circumstances" out of which the inadequacy of service arose (Br. in No. 28, pp. 13–17).[16] The exclusive jurisdiction of the Labor Board is not of "facts and circumstances" in the abstract, but extends only to certain legal relations that flow from a given set of facts and circumstances. Specifically, the jurisdiction of the Labor Board is limited to the regulation of labor-management relations. As this Court stated in *Local 1976, Carpenters' Union* v. *National Labor Relations Board*, 357 U.S. 93, 110, with respect to motor carriers regulated by the Interstate Commerce Commission:

> Whether a carrier has without justification failed to provide reasonable and nondiscriminatory service is a question of defining the carrier's duty in the framework of the national transportation policy. Whether there is a "strike or concerted refusal," or a "forcing or requiring" of an employer to cease handling goods is a matter of the federal policy governing labor relations. *The Board is not concerned with whether the carrier has performed its obligations to the shipper,* but whether the union has performed its obligation not to induce employees in the manner proscribed by

[16] It is noteworthy that appellant union also argues that a proceeding by the Commission under Section 212 of the Interstate Commerce Act would have been warranted under these circumstances (Br. in No. 28, pp. 18–19; see note 13, p. 25, *supra*). However, it nowhere suggests why its notions of "exclusive jurisdiction" in the NLRB would be any less applicable to such a proceeding than they would be to a Section 207(a) certification proceeding.

> § 8(b)(4)(A). Common factors may emerge in the adjudication of these questions, but they are, nevertheless, distinct questions involving independent considerations. * * * [Emphasis supplied.]

The Court there also considered the Interstate Commerce Commission's role in cases involving the interrelationship between regulated carriers' labor agreements and their service obligations (357 U.S. at 109–110):

> It is the Commission that in the first instance must determine whether, because of certain compelling considerations, a carrier is relieved of its usual statutory duty, and necessarily it makes this determination in the context of the particular situation presented by the case before it. Other agencies of government, in interpreting and administering the provisions of statutes specifically entrusted to them for enforcement, must be cautious not to complicate the Commission's administration of its own act by assuming as a fixed and universal rule what the Commission itself may prefer to develop in a more cautious and pragmatic manner through case-by-case adjudication.

The Court recognized, however, that the Commission's exercise of its regulatory authority might, in cases involving controversies in the area of labor-management relations, threaten some impingement upon the jurisdiction of other agencies. Accordingly, it approved (357 U.S. at 109) the cautious approach adopted by the Commission in *Galveston Truck Line Corp.* v. *Ada Motor Lines, Inc.*, 73 M.C.C. 617 (1957), where, although the Commission held (in the words of

the Court) "that the carriers there involved were not relieved from their obligations under the Interstate Commerce Act by a hot cargo clause," the Commission "was careful to draw [limitations] about its decision"—*i.e.*,

> It was not concerned to determine, as an abstract matter, the legality of hot cargo clauses, but only to enforce whatever duty was imposed on the carriers by the Interstate Commerce Act and their certificates. [It] recognized that it had no general authority to police such contracts, and its sole concern was to determine whether a hot cargo provision could be a defense to a charge that the carriers had violated some specific statutory duty.[17]

357 U.S. at 109. Cf. *Central New England Railway Co.* v. *Boston & A. R. Co.*, 279 U.S. 415, 418–419.

So in the present case, the Commission studiously avoided ruling on "the legality or propriety" of "hot cargo" clauses or purporting "to adjudicate any labor dispute or controversy" (R. 115). As an appropriate step in determining whether there was such an inadequacy of service as to warrant the certification of additional service, it did find that the interstate carriers had failed to comply with their service responsibilities, not-

[17] In the *Galveston* case, the Commission had said (73 M.C.C. at 625–626):

"We are here concerned, not with the legality of the 'hot cargo' clauses as such, but with the actions of the defendant carriers in relation to their obligations under the Interstate Commerce Act to the public, without regard to the terms of any contract which they may have executed with a third party. Clearly, a common carrier may not bargain away its statutory obligations to the public and thereby relieve itself of such obligations."

ing that "[t]hey cannot bargain away their duties and obligation to the public and thereby relieve themselves of such obligations" (R. 116). In so ruling, the Commission followed not only its own prior decisions, including the *Galveston* case, *supra*, see also *Planters Nut & Chocolate Co.* v. *American Transfer Co.*, 31 M.C.C. 719, 728 (1942), but the decisions of this Court. See *United States* v. *Village of Hubbard*, 266 U.S. 474, 477 n. 1, citing *New York* v. *United States*, 257 U.S. 591, settling that a carrier cannot stultify the requirements of the Interstate Commerce Act by simple reference to its private agreements. As Mr. Justice Brandeis stated in *Colorado* v. *United States*, 271 U.S. 153, 165–166, "even explicit charter provisions must yield to the paramount power of Congress to regulate interstate commerce."[18]

In thus restricting its decision to the transportation problem before it—a problem over which no other agency had jurisdiction—the Commission discharged its statutory functions in a manner entirely faithful to this Court's pronouncements in the *Carpenters'*

[18] And see *Brownwood North & South Ry. Co.* v. *Railroad Comm.* 16 F. 2d 297 (W.D. Tex., 1926); *Village of Mantorville* v. *Chicago Great Western R.*, 8 F. Supp. 791 (D. Minn., 1934); *Moeller* v. *Interstate Commerce Commission*, 201 F. Supp. 583 (S.D. Iowa, 1962). As early as 1934, the Commission rejected the contention that a prior labor agreement or alleged violation of the Railway Labor Act defeated its jurisdiction to issue a certificate under Section 1(18) of the Act, 49 U.S.C. 1(18). *Chicago Great Western R. Trackage*, 202 I.C.C. 227, 230 (1934), 207 I.C.C. 315, 317 (1935). The standard of public convenience and necessity in Section 207 continues the administrative and judicial interpretation of Section 1(18). *Interstate Commerce Commission* v. *Parker Motor Freight*, 326 U.S. 60, 65.

Union case. There is nothing about its decision that will embarrass any agency or court in ruling upon the legality or enforceability of "hot cargo" clauses, even in the field of transportation by motor carrier. The Commission's decision must thus be judged solely in relation to the Interstate Commerce Act, the National Transportation Policy and the transportation problems with which those enactments are concerned. So judged, we submit, it should plainly be sustained.

CONCLUSION

It is respectfully submitted that the judgment of the district court should be affirmed.

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APPENDIX

The National Transportation Policy, 54 Stat. 899, 49 U.S.C., preceding § 1, provides:

> It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions—all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy.

Section 204(c) of the Interstate Commerce Act, 49 Stat. 546, 49 U.S.C. 304(c), provides:

> Upon complaint in writing to the Commission by any person, State board, organization, or body politic, or upon its own initiative without complaint, the Commission may investigate

whether any motor carrier or broker has failed to comply with any provision of this part, or with any requirement established pursuant thereto. If the Commission, after notice and hearing, finds upon any such investigation that the motor carrier or broker has failed to comply with any such provision or requirement, the Commission shall issue an appropriate order to compel the carrier or broker to comply therewith. Whenever the Commission is of opinion that any complaint does not state reasonable grounds for investigation and action on its part, it may dismiss such complaint.

Section 207(a) of the Interstate Commerce Act, 49 Stat. 551, 49 U.S.C. 307(a), provides:

Subject to section 210, a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operations covered by the application, if it is found that the applicant is fit, willing, and able properly to perform the service proposed and to conform to the provisions of this part and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, to the extent to be authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied: *Provided, however,* That no such certificate shall be issued to any common carrier of passengers by motor vehicle for operations over other than a regular route or routes, and between fixed termini, except as such carriers may be authorized to engage in special or charter operations.

Section 212(a) of the Interstate Commerce Act, 49 Stat. 555, 49 U.S.C. 312(a), provides:

Certificates, permits, and licenses shall be effective from the date specified therein, and shall remain in effect until suspended or termi-

nated as herein provided. Any such certificate, permit, or license may, upon application of the holder thereof, in the discretion of the Commission, be amended or revoked, in whole or in part, or may upon complaint, or on the Commission's own initiative, after notice and hearing, be suspended, changed, or revoked, in whole or in part, for willful failure to comply with any provision of this part, or with any lawful order, rule, or regulation of the Commission promulgated thereunder, or with any term, condition, or limitation of such certificate, permit, or license: *Provided, however,* That no such certificate, permit, or license shall be revoked (except upon application of the holder) unless the holder thereof willfully fails to comply, within a reasonable time, not less than thirty days, to be fixed by the Commission, with a lawful order of the Commission, made as provided in section 204(c), commanding obedience to the provision of this part, or to the rule or regulation of the Commission thereunder, or to the term, condition, or limitation of such certificate, permit, or license, found by the Commission to have been violated by such holder: *And provided further,* That the right to engage in transportation in interstate or foreign commerce by virtue of any certificate, permit, license, or any application filed pursuant to the provisions of section 206, 209, or 211, or by virtue of the second proviso of section 206(a) or temporary authority under section 210(a), may be suspended by the Commission, upon reasonable notice of not less than fifteen days to the carrier or broker, but without hearing or other proceedings, for failure to comply, and until compliance, with the provisions of section 211(c), 217(a), or 218(a) or with any lawful order, rule, or regulation of the Commission promulgated thereunder.